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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 JEFFREY R. FORD, et al.,

11 Plaintiffs,

12 v.

13 BNSF RAILWAY COMPANY, a Delaware
14 corporation,

15 Defendant.

Case No. C16-1383 RSM

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

16 This matter comes before the Court on Defendant BNSF Railway Company ("BNSF")'s
17 Motion for Summary Judgment. Dkt. #22. BNSF argues, *inter alia*, that Plaintiffs Jeffrey
18 Ford, Donald Bigham, and Geoffrey Mirelowitz cannot establish a prima facie case under the
19 Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109, the sole basis for this action.
20 Plaintiffs oppose this Motion. Dkt. #24. For the reasons set forth below, the Court GRANTS
21 BNSF's Motion and DISMISSES all claims in this case.
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24 **I. BACKGROUND**

25 This case concerns the termination of employment of Plaintiffs Jeffrey Ford, Donald
26 Bigham, and Geoffrey Mirelowitz with BNSF. Although the parties have submitted extensive
27 facts about Plaintiffs' employment and about BNSF's practices generally, the Court is only
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1 concerned with whether or not Plaintiffs can present evidence that they were terminated for
2 protected activity in violation of the FRSA.

3 Plaintiffs were fired on August 24, 2012. Dkt. #23-15. They had been suspended
4 pending an investigation into events occurring earlier in the year. *Id.*; *see also* Dkt #23-14
5 (setting forth procedure for being withheld from service). BNSF stated that the terminations
6 were for violating certain company rules related to clocking in and out, among other related
7 rules. Dkt. #23-15.

9 On December 4, 2012, Plaintiffs filed complaints with the Occupational Safety &
10 Health Administration (“OSHA”) under the Federal Railroad Safety Act (“FRSA”), 49 U.S.C.
11 § 20109. Dkt. #23-16. Plaintiffs essentially argued that they were whistleblowers, “fired in
12 retaliation for refusing to authorize the use of safety-related equipment... [and] for reporting in
13 good faith a hazardous safety condition... about unsafe switches.” *Id.* These complaints did
14 not further explain when and where Plaintiffs refused to authorize the use of safety-related
15 equipment, or when and where they reported hazardous safety conditions.

17 On March 31, 2016, OSHA issued Secretary’s Findings, concluding that “there is no
18 reasonable cause to believe that [BNSF] violated the FRSA,” “insufficient evidence to establish
19 reasonable cause that a violation had occurred,” and “[t]he evidence failed to show a nexus
20 between the protected activities and the adverse actions.” Dkt. #26-1. Plaintiffs objected to
21 OSHA’s findings and requested a hearing before an Administrative Law Judge (“ALJ”), which
22 was later dismissed without prejudice. Dkt. #23-18. On August 31, 2016, plaintiffs filed
23 separate complaints with this Court pursuant to 49 U.S.C. § 20109(d)(3). *See* Dkt. #1. These
24 were consolidated into this action on January 20, 2017. Dkt. #12. BNSF now moves for
25 summary judgment dismissal of all Plaintiffs’ claims. Dkt. #22.
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II. DISCUSSION

A. Legal Standard

Summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Material facts are those which might affect the outcome of the suit under governing law. *Anderson*, 477 U.S. at 248. In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins. Corp. v. O’Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992)).

On a motion for summary judgment, the court views the evidence and draws inferences in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Sullivan v. U.S. Dep’t of the Navy*, 365 F.3d 827, 832 (9th Cir. 2004). The Court must draw all reasonable inferences in favor of the non-moving party. *See O’Melveny & Meyers*, 969 F.2d at 747, *rev’d on other grounds*, 512 U.S. 79 (1994). However, the nonmoving party must make a “sufficient showing on an essential element of her case with respect to which she has the burden of proof” to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Further, “[t]he mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 251.

B. Requirements for Claims brought under the Federal Railroad Safety Act

The FRSA serves “to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” 49 U.S.C. § 20101. Pursuant to the FRSA, a railroad

1 carrier, such as BNSF, may not “discharge, demote, suspend, reprimand, or in any other way
2 discriminate against an employee if such discrimination is due, in whole or in part,” to an
3 employee’s engagement in a protected activity. 49 U.S.C. § 20109(a). To state a claim of
4 retaliation under the FRSA, a plaintiff bears the initial burden of pleading sufficient facts that
5 demonstrate “(1) he engaged in a protected activity; (2) the employer knew he engaged in the
6 allegedly protected activity; (3) he suffered an unfavorable personnel action; and (4) the
7 protected activity was a contributing factor in the unfavorable personnel action.” *Rookaird v.*
8 *BNSF Ry. Co.*, No. C14-176RSL, 2015 WL 6626069, at *2 (W.D. Wash. Oct. 29, 2015);
9 *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *Heim v. BNSF*
10 *Ry. Co.*, 849 F.3d 723, 726-27 (8th Cir. 2017). If the plaintiff establishes this prima facie case,
11 the burden shifts to the railroad carrier to demonstrate “by clear and convincing evidence that
12 [it] would have taken the same unfavorable personnel action in the absence of the protected
13 activity.” *Rookaird*, 2015 WL 6626069 at *2.

14 15 16 **1. Protected Activity**

17 To sustain a retaliation claim under the FRSA, a plaintiff must have engaged in a
18 protected activity. *Rookaird*, 2015 WL 6626069 at *2; *Araujo*, 708 F.3d at 157. The FRSA
19 specifies what constitutes a protected activity, grouping them generally into three categories:
20 (1) providing information pertaining to the investigation of or proceeding about a violation of
21 safety regulations, *see* 49 U.S.C. § 20109(a); (2) “reporting, in good faith, a hazardous safety or
22 security condition” or refusing to work around a hazardous safety condition, *see id.* § 20109(b);
23 and (3) requesting medical treatment for a work-related injury, *see id.* § 20109(c).

24 BNSF argues there is no evidence that Plaintiffs engaged in a protected activity. For
25 Plaintiffs Bigham and Ford, Plaintiffs claimed in deposition that this protected activity occurred
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1 in April or May of 2012 when they asked Superintendent Matthew Garland what kind of switch
2 maintenance program there was for the Seattle Terminal. Dkt. #23-1 (Bigham Deposition) at
3 124:3-129:17; Dkt. #23-2 (Mirelowitz Deposition) at 43:21-47:1.). Garland allegedly did not
4 get back to Plaintiffs with an answer. Bigham Dep. at 126:19-127:18. BNSF argues that this
5 cannot constitute protected activity because Plaintiffs did not provide information or assist in
6 an investigation about a violation of safety regulations, and that therefore the activity is not
7 protected under 49 U.S.C. § 20109(a). BNSF argues it cannot constitute protected activity
8 under 49 U.S.C. § 20109(b) either because “Plaintiffs reported no hazardous safety condition
9 during their meeting with Garland...” Dkt. #22 at 11. BNSF argues that the Court should also
10 dismiss Mirelowitz’s claim against BNSF, “insofar as Mirelowitz relies upon the April or May
11 2012 meeting with Garland and Marx to try and satisfy the required element of protected
12 activity.” *Id.*

15 Plaintiffs’ Response is full of passionate argument, yet, incredibly, only contains *two*
16 citations to the record, discussed below. Plaintiffs’ “Facts” section narrates as if citations are a
17 pointless formality. For example, and critical to the Court’s analysis here, Plaintiffs state—by
18 footnote—that “[t]he crew complaints, at issue in this case, began with a particular switch
19 beginning in January of 2012,” that “[t]he crew complained about the switch repeatedly but the
20 switch initially was not properly repaired, and that “[e]ventually after considerable effort by
21 Bigham, Ford and Mirelowitz, and resistance by some BNSF officers, the switch was finally
22 repaired.” Dkt. #24 at 4 n.3. Plaintiffs make this important assertion without citation. In
23 discussing the meeting with Garland, which Plaintiffs rely on to establish a protected activity,
24 Plaintiffs assert that “[i]n that meeting... and in subsequent email correspondence the crew
25 jointly asserted the need for improvements in switch maintenance.” *Id.* at 5 n.4. Again, no
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1 citations. Plaintiffs cannot rely on the words of their counsel. *British Airways Bd. v. Boeing*
2 *Co.*, 585 F.2d 946, 952 (9th Cir. 1978) (“[L]egal memoranda and oral argument are not
3 evidence, and they cannot themselves create a factual dispute sufficient to defeat summary
4 judgment”). The first of Plaintiffs’ citations is to a May 25, 2012, email from Garland to
5 Plaintiff Mirelowitz, which states:

6 Geoff,

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8 Following up on our conversation regarding Switch Maintenance a
9 few weeks back in West Seattle. Apologize for taking this long to
10 get back to you.

11 Below is the process that our Engineering Team adheres to for
12 switch maintenance in West Sea.

- 13 1) Each switch is check once per week, this typically occurs on
14 Thursday or Friday.
15 2) Switch maintainer is assigned to check, in case of vacation or
16 illness another maintainer is assigned
17 3) When checking each switch, the switch is first thrown and if it
18 throws fine he/she continues to next switch. If switch does not
19 throw correctly it is then broomed, oiled and rechecked.
20 4) If switch is hard to throw, torque indicator is utilized to
21 validate and is adjusted to specifications.

22 Please let me know if you have any concerns.

23 Dkt. #25-2 at 64. Plaintiffs argue “[b]ased upon this email alone there is sufficient proof that
24 protected conduct occurred and that the Defendant knew about the conduct.” Dkt. #24 at 14.
25 The Court disagrees. This email, alone, provides no evidence that Plaintiffs *reported* a safety
26 issue, as opposed to inquiring about one, and provides no evidence of a *hazardous* safety
27 situation. Plaintiffs argue, without citation, that “it is undisputed that the three plaintiffs made
28 safety complaints concerning the condition of railroad track switches.” *Id.* at 13.¹ This is flatly

¹ Plaintiffs argue that they “reported a defective track switch on January 31, 2012; and then from January through May, there were other ongoing difficulties with the switches and with difficulty getting the Defendant to fix the defective switches at Job 113. The three plaintiffs (jointly) submitted and then pushed complaints concerning the

1 contradicted by BNSF's briefing, to which Plaintiffs are responding. BNSF does not concede
2 that Plaintiffs engaged in protected activity. Plaintiffs briefing cites to only one other exhibit in
3 the entire Response brief, "Declaration of George A. Thornton, Exh. 10," described by
4 Plaintiffs' counsel as "true and correct copies of some of BNSF articles regarding Plaintiffs,
5 specifically Don Bigham, recognizing him for his ongoing loyalty and commitment to his
6 career with Defendant." Dkt. #25 at 2; Dkt.#25-10. The Court believes Plaintiffs intended to
7 cite to Exhibit 9, "the FRA report dated January 25, 2013, detailing inspection of track switches
8 in the West Seattle area," but cannot be sure. *See* Dkt. #25 at 2; Dkt. #24 at 15. In any event,
9 this evidence does not support the existence of protected activity.
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11 Pursuant to the Local Civil Rules, parties must support factual assertions with a citation
12 to the record, including a pincite to the relevant page or pages. *See* LCR 10(e)(6) ("In all cases
13 where the court is to review the proceedings of an administrative agency, transcripts, deposition
14 testimony, etc., the parties shall, insofar as possible, cite the page and line of any part of the
15 transcript or record to which their pleadings, motions[,] or other filings refer."). Using specific
16 citations, the nonmoving party must direct the court's attention to specific facts and may not
17 rely on generalized declarations or general citations to an entire deposition. "The district court
18 need not examine the entire file for evidence establishing a genuine issue of fact, where the
19 evidence is not set forth in the opposing papers with adequate references so that it could
20 conveniently be found." *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030-
21 1031 (9th Cir. 2001); *see also Jaurequi v. Carter Mfg. Co.*, 173 F.3d 1076, 1085 (8th Cir.
22 1999) ("[A] district court is not 'obligated to wade through and search the entire record for
23 some specific facts which might support the nonmoving party's claim.'" (internal citation
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28 safety of railroad track switches where they regularly worked." Dkt. #24 at 13. Again, there are no citations for
any of this.

omitted); *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998) (“Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party’s opposition to summary judgment.”) (internal citation omitted).

Although Plaintiffs are the nonmoving party, they must still make a sufficient showing on an essential element of their case with respect to which they have the burden of proof to survive summary judgment. *Celotex, supra*. Further, “[t]he mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 251. The Court finds that Plaintiffs have failed to make a sufficient showing that they engaged in protected activity in this matter, and that this is an essential element of their case with respect to which they have the burden of proof. Plaintiffs’ attempts to cobble together protected activity evidence, either by submitting hundreds of pages of uncited documents, or by pointing to the May 25, 2012, email and surrounding communications, do not rise above a scintilla. Asking about safety issues does not equate to reporting on safety issues, and certainly there is no evidence submitted of reporting on a *hazardous* safety condition, as required under the FRSA. Without evidence to support the protected activity element, Plaintiffs cannot meet the requirement to show a *prima facie* case under the FRSA, and the Court’s analysis stops. Summary judgment dismissal of all of Plaintiffs claims is warranted.

III. CONCLUSION

Having reviewed the relevant briefing, the declarations and exhibits attached thereto, and the remainder of the record, the Court hereby finds and ORDERS:

- 1) Defendant BNSF’s Motion for Summary Judgment (Dkt. #22) is GRANTED. All of Plaintiffs’ claims are DISMISSED.

1 2) All pending Motions in this case are STRICKEN.

2 3) This case is CLOSED.

3 DATED this 8th day of December 2017.

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7 RICARDO S. MARTINEZ
8 CHIEF UNITED STATES DISTRICT JUDGE
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